1959

La Rene Holmes v. P. C. Heidebrecht : Brief of Appellant

Utah Supreme Court

Young, Thatcher & Glasmann; Attorneys for Appellant;

No. 8988

IN THE SUPREME COURT
of the
STATE OF UTAH

LA RENE HOLMES,

Plaintiff and Appellant,

vs.

vs.

P. C. HEIDEBRECHT,

Defendant and Respondent.

Appellant's Brief

LeRoy B. Young, of
YOUNG, THATCHER & GLASMANN
1018 First Security Bank Bldg.
Ogden, Utah
Attorneys for Appellant

INDEX

CASES CITED

STATUTES AND AUTHORITIES CITED

IN THE SUPREME COURT
of the
STATE OF UTAH

LA RENE HOLMES,

Plaintiff and Appellant,

vs.

P. C. HEIDEBRECHT,

Defendant and Respondent.

BRIEF OF APPELLANT

This is an appeal by plaintiff from a verdict of a jury in favor of defendant.

STATEMENT OF FACTS

The accident involves an automobile-pedestrian accident which occurred on the 12th day of September, 1957, at about 8:00 o'clock A.M. on 12th Street in Ogden, Utah. There is little conflict in the evidence.

Plaintiff resided in the family home situate on the North side of 12th Street approximately 525 feet West of Washington Boulevard. Twelfth Street extends in an easterly and westerly direction.

The Holmes' own a considerable portion of land bordering on the North side of said street. There are no street intersections between Washington Boulevard and Wall Avenue and there are no marked pedestrian lanes across 12th Street. The only way they could cross in a pedestrian lane would require walking easterly to Washington Boulevard, a distance of 525 feet, or westerly to Wall Avenue which is several blocks to the West.

There is an irrigation ditch extending along the South side of 12th Street, South of the sidewalk, which furnishes water for the irrigation of the Holmes' property as well as other property owners in the vicinity. The Holmes maintain a headgate in this ditch in front of the Sorensen house located on the South about 40 feet West of the entrance to their home. Their water is transported across 12th Street by an underground pipe. Twelfth Street is 42 feet wide from curb to curb with a black-top covering about 18 or 19 feet wide extending down the center leaving a gravel strip of about 9.5 feet on each side which is readily available for travel. There is no painted line dividing the street (see photos, defendant's Exhibits 1 and 2).

On the morning of September 12th, at about 7:45 o'clock A.M., plaintiff proceeded from her home driveway southerly direct to the headgate to see if the boards had been removed from the headgate. Upon ascertaining that they had been removed, she then was standing on the South sidewalk at at a point marked "X" (defendants Exhibit 2). She looked to the East, saw a car, which she recognized as the water master's, proceeding easterly some distance to the East and saw no cars in

the immediate vicinity proceeding westerly. She then looked to the West and seeing no car approaching in the immediate vicinity, she stepped from the sidewalk, across the curb and then proceeded in a northeasterly direction toward her driveway. The distance from curb along this diagonal line is 50 feet. When she had reached a point near the center of the highway she was struck by defendant's car which was proceeding easterly on 12th Street. She was struck by the right headlight of defendant's car. No warning of any kind was given by dedendant. Plaintiff sustained very serious injuries. The street was clear, the road dry, there was nothing in the street to interfere with defendant's vision. He, therefore, had a clear and unobstructed view of plaintiff from the time she stepped from the sidewalk until she reached the point of contact.

Officer Anderson arrived at the scene of the accident shortly after it occurred. He made a careful inspection and located the point of contact as being 18 feet 4 inches North of the South curb on a direct line which would put plaintiff 2 feet 8 inches or one step South of the center and measured along the diagonal line she had travelled about 22 feet 4 inches after stepping from the sidewalk to the South curb so that she had walked better than 25 feet in plain view of defendant as he proceeded along said roadway.

Defendant testified that he had arrived in Ogden only two days before the accident and that he was looking for a mail box to post a card to his family. Whatever he was doing he certainly was not looking ahead for pedestrians on the roadway as he stated he did not see

plaintiff until the moment of impact.

Plaintiff was thrown upon the hood, carried some distance and then thrown violently to the roadway some distance to the East of the point of contact. She was lying on the blacktop portion of the street with her head to the North. Defendant testified he was travelling at about 25 miles per hour.

It is clearly established that inasmuch as plaintiff was struck by the right headlight that defendant's car was proceeding easterly over the centerline of the unmarked street.

Officer Bennett, a qualified expert, testified that he had checked the walking speed of many women and that the average walking speed is 4.11 feet per second. Plaintiff was 54 years of age, a large woman, weighing about 195 pounds and she testified that she walked at her normal gait. It is, therefore, reasonable to conclude that she was walking at probably a slower speed than the average.

Officer Bennett further testified that if plaintiff walked 23 feet at 4.11 feet per second and defendant's car was poceeding at the rate of 25 miles per hour he would travel 36 2/3 feet per second. Therefore, defendant's car would have been at least 205.29 feet West of the point of contact when plaintiff left the curb. He further testified that defendant could have stopped his car, including reaction time, in 53.49 feet. In other words, defendant could have stopped his car at any time before reaching a point 53.49 feet from the point of contact and he could thereby have avoided the accident and, of course, he could have turned his car to the right

and avoided striking the plaintiff when much closer than 53.49 feet had he been looking ahead for pedestrians.

STATEMENT OF POINTS

1. The court erred in giving Instruction No. 8.

2. The court erred in denying plaintiff's motion for a new trial.

ARGUMENT

Appellant's principal argument relates to the court's Instruction No. 8 as follows:

> "The laws of the State of Utah require that every pedestrian crossing a roadway at any point other than within a marked cross-walk or within an unmarked cross-walk at an intersection shall yield the right-of-way *to all vehicles upon the roadway.* If you find that at the time and place of the accident involved in this lawsuit the plaintiff, LaRene Holmes, was not crossing the roadway at a marked or unmarked crosswalk and if you further find that she failed to yield the right-of-way to the defendant's vehicle *then you will find such conduct on her part to be negligence.*"

We contend that this instruction should not have been given for the following reasons:

A. It is an incorrect statement of the law.

B. It is a so-called formula instruction argumentive in nature and fails to set out the principle of law applicable to the issues impartially as to both plaintiff and defendant.

C. Said instruction following immediately after

Instruction No. 7 tends to mislead or confuse the jury.

D. It is inconsistent and contradictory to Instruction No. 7.

E. It gives undue prominence to the so-called right-of-way.

We will discuss these points in the order above set forth although there will no doubt be some overlapping in our general discussion.

A. The court fully, correctly and adequately instructed the jury on all issues raised by the pleadings, absent Instruction No. 8. Instruction No. 7 is taken from Utah Jury Instructions Form No. 20.8. It correctly sets forth in clear and understandable language the duty imposed upon a pedestrian who crosses a public highway at an unmarked point on the highway. Instruction No. 7, paragraph 2 says:

> "If she crosses at any other place the law requires her to yield the right-of-way to all vehicles *on the roadway so near as to constitute an immediate hazard,* although this requirement does not relieve the driver of a vehicle from the duty to exercise ordinary care for the safety of any pedestrian upon any roadway."

Then in Instruction No. 8 the court tells the jury that the laws of the State of Utah require every pedestrian crossing a roadway at any point other than within a marked cross-walk to yield the right-of-way *to all vehicles upon the roadway.* There is a vast difference between yielding the right-of-way to vehicles on the roadway so near as to constitute an immediate hazard (Instruction No. 7) and a duty to yield the right-of-way to all vehicles

upon the roadway (Instruction No. 8). We admit that this is the language of the statute yet to merely quote the statute without some explanation as to its meaning leaves the jury bewildered and confused.

We invite the court's attention to the case of *Collins* vs. *Lindell,* 67 *Utah* 476, 247 *Pac.* 476. This case involves an intersection crossing. The statute which applied was as follows:

> "An operator of a vehicle shall have the right-of-way over the operator of another vehicle who is approaching from the left in an intersecting or connecting highway and shall give the right-of-way to an operator of a vehicle approaching him from the right at an intersecting or connecting highway."

In this case, like our own, it became the duty of the court to interpret to the jury the meaning of this language. Plaintiff requested the court to instruct the jury as to the meaning of this statute which the court refused to do. The requested instruction is fully set out on page 479 of the Pacific Reporter. The court, however, gave an instruction (No. 7) and the question was whether or not the court committed error in refusing to give the requested instruction which defined the statute and limited its application to means that the right-of-way applies only where the travellers or vehicles on intersecting streets approach the crossing *so nearly at the same time at such rates of speed that if both proceeded each without regard for the other a collision is reasonably to be apprehended.* This court held that the court should have given this instruction and that failure to do so constitituted reversible error notwithstanding the giv-

ing of Instruction No. 7.

We quote from Mr. Justice Thurman

> "In the opinion of the writer the statute contemplates that whenever there is reasonable grounds to doubt whether it is safe to attempt to cross an intersecting highway in front of a driver on the right, the driver on the left should yield the right-of-way."

In other words, the mere quoting of the statutes without qualifying and limiting its meaning constitutes prejudicial error. So in our case, the vice of Instruction No. 8 is clearly demonstrated in this that the court failed to tell the jury what is meant by the words

> ". . . yield the right-of-way to a vehicle upon the roadway."

What the learned trial judge in effect told the jury was that if a person crossed a public highway at an unmarked point he must yield the right-of-way to all vehicles upon the roadway and that failure to do so constituted negligence as a matter of law.

We cannot conceive of anything more confusing to a jury that to tell them that it is the duty of pedestrian in crossing at an unmarked crosswalk to yield the right-of-way *to all vehicles upon the roadway.* Notwithstanding this statute, when correctly interpreted, as done in Instruction No. 7, does not require a pedestrian to yield the right-of-way to all vehicles upon the roadway but what it does require is that the pedestrian must yield the right-of-way to all vehicles on the roadway *approaching so near as to constitute an immediate hazard.* Literally, the meaning of Instruction No. 8, with-

out qualification, would mean that no person could ever cross a highway at any point other than in a marked way and in our case it would be negligence, says the crosswalk because there are always cars upon the road- court, if a car was on 12th Street at any point between Wall Avenue and Washington Boulevard and plaintiff would be guilty of negligence as a matter of law if she attempted to cross the highway. Such is not and cannot be the law, irrespective of the language of the statute.

It might be argued that in view of the fact that the court correctly instructed the jury in Instruction No. 7, that this error is not prejudicial. Our answer is found in the case of

Sorensen v. Bell, 51 Utah 263, 170 Pac. 72 wherein the court says in discussing an erroneous instruction

> "True, counsel point to other portions of the charge wherein they contend the rule respecting the burden of proof is correctly stated. If that be conceded, it still does not minimize, much less correct the palpable error contained in the foregoing instruction."

And Mr. Chief Justice Crockett in the recent case of

Ivie v. Richardson, 336 P. 2d 718 at page 786 says:

> "It is conceded that the issues of contributory negligence was properly covered in the next instruction. This, however, pitted one instruction against the other and might have been confusing to the jury."

The test for correctness of an instruction is how it will naturally be understood by the average men composing juries.

See 88 C. J. S., Page 890

and a large number of cases cited in the notes and again at page 894 that author says:

> "The test for the correctness of an instruction does not lie in the indulgence which a lawyer in his office with the aid of his books or the trial and appellate courts with the benfit of briefs and arguments of counsel give to instructions but as to how the instruction will naturally be understood by the average men composing juries."

and at page 897 the author further says:

> "It is proper to refuse and error to give conflicting instructions on a material point since a charge containing two distinct propositions conflicting with each other tends so to confuse the jury as to prevent their rendition of an intelligent verdict."

We further contend that the second paragraph of Instruction No. 8 is also an incorrect statement of the law wherein the court instructs the jury that if they find that plaintiff failed to yield the right-of-way then you will find such conduct on her part to be negligence. This is equivalent to a directed verdict. The instruction does not tell the jury that they *may* find the plaintiff guilty of negligence but it says that they *must* find the plaintiff guilty of negligence.

In the case of

Morrison v. Peery, 194 Utah 151, 140 P. 2d 772 in discussing this question of whether or not the violation of a rule of the road is negligence as a matter of law, says:

> "The presumption of negligence on the part of defendant arising from auto collision on defendant's wrong side of the road (violation of the statute) ceases the moment an explanation is offered, but the evidence upon which the presumption is based remains in the case and is to be considered by the jury unless there is no conflict between such evidence and the explanatory evidence."

In other words, as we understand it, the mere violation of a rule of the road statute does not constitute negligence per se. It merely raises a presumption of negligence.

Instruction No. 8 is a good example of this presumption. In Instruction No. 7 the court tells the jury that a pedestrian must yield the right-of-way to all vehicles on the roadway *approaching so near as to constitute an immediate hazard* and then is subdivision 3 of Instruction 7 the court says the amount of caution required to constitute ordinary care increases, as does the danger that a reasonably prudent person in like position would apprehend in this situation. In other words, the question should be left to the jury to determine whether or not, under the facts as disclosed the plaintiff acted as a reasonably prudent person would act in crossing a street when a car was approaching at rate of 25 miles per hour back a distance of better than 200 feet was guilty of negligence proximately causing or contributing to her injuries.

B. We again refer to Mr. Chief Justice Crockett's opinion in the Ivie v. Richardson case, supra, wherein he refers to Instruction No. 4 and says:

"The above instruction taken by itself is in error because it fails to take into account the possible contributory negligence of the plaintiff. This kind of an instruction sometimes referred to as a formula instruction which makes a recital in accordance with the contention of the party and ends with the conclusion and if you so find then your verdict must be for the party is not generally a good type of instruction to give. This is so because it lends itself to the error just noted and also because it tends to be argumentive rather than to set out the principles of law applicable to the issues impartially as to both parties for such reasons it is better to avoid giving instructions of that type."

C. We have already discussed how the giving of Instruction No. 8 immediately following Instruction No. 7 would tend to mislead or confuse the jury.

D. We have also discussed how Instruction No. 8 is inconsistent and contradictory to Instruction No. 7.

E. Instruction No. 7 correctly informed the jury as to the respective duties of pedestrians crossing a highway on a unmarked crossing and also the duty of the driver of the approaching vehicle and the court having given this instruction together with Instruction No. 9, it seems to us that the issues were fully and fairly presented and that the giving of additional Instruction No. 8 gave undue prominence to the alleged contributory negligence of the plaintiff.

88 C. J. S., Page 903 says:

"It is error to give and improper to refuse instructions which unduly emphasize issues, theories, defenses, particular evidence, specific

or assumed facts or burden of proof whether by repetition or by singling them out and making them unduly prominent."

2. THE COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL. We realize that a trial court has considerable discretion in granting or denying a motion for a new trial and that this court will reverse the trial court only upon the showing of an abuse of discretion. It is our view, however, that this case presents a situation where the refusal of the trial court to grant a new trial does constitute an abuse of discretion. It must be remembered that there is little conflict in the evidence and it is our contention that this verdict was contrary both as to law and the evidence. This subject is discussed in

66 C. J. S. starting at Page 200.

We will quote a few general statements from the above text.

At page 206 the author says:

> "Generally speaking it is grounds for new trial that the verdict is contrary to the evidence or tothe *weight of the evidence providing there is substantial evidence adduced to support a verdict contrary to the one returned* and the trial court has the power and the duty to determine whether a verdict should be set aside and a new trial granted on this ground."

At Page 211 the author says:

> "A new trial may be permissable or required where the verdict is so contrary to the evidence or to the weight of the evidence as to indicate that the jury were influenced by passion, pre-

judice or other improper motive even in passing on the creditability of instructions notwithstanding there is some evidence in favor of the prevailing party."

Again at Page 222 the author says:

> "As as general rule a verdict rendered contrary to or in disregard of evidence which was not improper or inconsistent and was not contradicted or discredited will be set aside and a new trial granted . . . Where even opposing interests are deducible from uncontradicted probative facts the court may draw inferences opposed to the inferences accepted by the jury and may thus resolve the conflicting inferences in favor of the party moving for a new trial."

This is not a case where a pedestrian suddenly and without warning steps from behind a parked automobile or in the line of an approaching car in the nighttime such as

> Mingus v. Olson, 114 Utah 585, 201 P. 2d 495;
> Cox v. Thompson, Utah, 254 P. 2d 1047;
> Smith v. Bennett, Utah , 265 P. 2nd 401.

This is a case where the defendant in broad daylight with an unobstructed clear view ahead strikes a pedestrian when she has reached within one step of the center of the highway after having travelled in plain view a distance of nearly 25 feet. The defendant travelling only 25 miles per hour.

It seems inconceivable to us that under that factual situation a jury could have returned a verdict in favor of the defendant. We can account for it only on the theory that the jury either misunderstood the instruct-

ions or else for some unaccountable reason returned a verdict through passion or prejudice.

> Mr. Justice McDonough, in the recent case of Winn v. Read, Utah , 335 P. 2d 627,

in commenting on the facts presented in that case, says:

> "If, as a matter of fact, the horseman, though on the wrong side of the road, did travel for 30 rods, or any substantial distance on the left hand side of the road, then the defendant should have observed him and should have avoided running into him. If he failed so to do he was guilty of negligence *that was the sole proximate cause of the collisions.*"

So in this case, if the plaintiff was guilty of negligence in failing to see the approaching car at least 200 feet away from her yet walking as she did in plain view for a distance of nearly 25 feet when the driver could stop within 53.49 feet and failed to make any effort to avoid the accident, it seems to us that the defendant's admitted negligence was the sole proximate cause of the collision and the defendant certainly had the last clear chance to have avoided the accident.

See Marcellin v. Osguthrope, Utah, 336 P. 2d 779 wherein Mr. Chief Justice Crockett discusses the doctrine of last clear chance. Wherein he states

> "Should we accept the other aspects of plaintiff's argument there would still be no basis to find that defendant had a clear chance to avoid the accident. There must be, as the phrase implies, a fair and clear chance and not a mere

possibility that one might have avoided the accident by the skin of his teeth."

The undisputed evidence in this case discloses such a factual situation did not exist. The evidence conclusively shows that the defendant did in fact have a fair and clear chance to have avoided the accident.

We feel strongly that the trial court committed reversible error in denying plaintiff's motion for a new trial.

Respectfully submitted,

LeRoy B. Young, of

YOUNG, THATCHER & GLASMANN

Attorneys for Plaintiff and Appellant

1018 First Security Bank Building

Ogden, Utah